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Nos. 82-1913 and 82-1951

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In the Supreme Court of the United States

OCTOBER TERM, 1983

JOE G. GARCIA, APPELLANT

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, ET AL.

RAYMOND J. DONOVAN, SECRETARY OF LABOR, APPELLANT

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

BRIEF FOR THE SECRETARY OF LABOR

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QUESTION PRESENTED

Whether, under the doctrine of intergovernmental immunity recognized in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), the minimum wage and overtime provisions of the Fair Labor Standards Act may constitutionally be applied to the employees of a publicly owned and operated mass transit system.

PARTIES TO THE PROCEEDING BELOW

In addition to the appellee named in the caption, the American Public Transit Association is an appellee in this Court.

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OPINIONS BELOW

The amended opinion of the district court (J.S. App. 1a-20a) is reported at 557 F. Supp. 445.[1] A prior judgment order issued by the district court (J.S. App. 22a-24a) that was vacated by this Court (*Donovan* v. *San Antonio Metropolitan Transit Authority*, 457 U.S. 1102 (1982)) is unreported.

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[1] The district court issued a memorandum opinion and judgment on February 14, 1983, but it withdrew the opinion and judgment on February 18, 1983, and entered an amended opinion and judgment on that date. The court's February 18 order (J.S. App. 21a) recites that the amended judgment shall "be effective as of February 14, 1983." (Unless otherwise indicated, references to "J.S. App." are to the appendix to the jurisdictional statement in No. 82-1951).

JURISDICTION

The amended judgment of the district court (J.S. App. 25a-27a) was entered on February 18, 1983, effective February 14, 1983 (see note 1, *supra*). The federal appellant's notice of appeal to this Court (J.S. App. 28a-29a) was filed on March 3, 1983. Appellant Garcia's notice of appeal (82-1913 J.S. App. 22a) was filed on March 16, 1983. On April 25, 1983, Justice White extended the time for docketing the appeals to and including June 1, 1983. The jurisdictional statements of appellant Garcia and the federal appellant were filed on May 26, 1983, and June 1, 1983, respectively. Probable jurisdiction was noted on October 3, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1252.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The relevant provisions of the Constitution, the Fair Labor Standards Act of 1938, 29 U.S.C. (& Supp. V) 201 *et seq.*, and the Urban Mass Transportation Act of 1964, 49 U.S.C. (& Supp. V) 1601 *et seq.*, are set forth in an appendix to this brief, *infra*, 1a-6a.

STATEMENT

1. The Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. (& Supp. V) 201 *et seq.*, requires covered employers to pay their employees a minimum hourly wage and to pay them at no less than one and one-half times their regular rate of pay for hours worked in excess of 40 during a work week. See 29 U.S.C. (& Supp. V) 206(a)(1) and 207(a)(1).[2] The original version of the FLSA excluded states and their political subdivisions from the definition of an "employer" used in the minimum wage and overtime provisions; state and municipal employees accordingly were unprotected under these provisions of the Act. See 29 U.S.C. (1940 ed.) 203(d). In

[2] The Act also proscribes "oppressive child labor." 29 U.S.C. 212(c).

1966, Congress extended the coverage of the FLSA in various respects and eliminated the previously applicable exemption as to virtually all employees of hospitals, institutions, and schools operated by the states and their subdivisions, whether operated for profit or on a nonprofit basis, that were deemed to be "[e]nterprise[s] engaged in commerce or in the production of goods for commerce." Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, § 102(a), (b), and (c), 80 Stat. 831, 29 U.S.C. (1970 ed.) 203(d), 203(r)(1), 203(s)(4).[3] The constitutionality of this "enterprise concept" of coverage and of the inclusion of publicly operated schools, hospitals, and institutions under the Act was sustained in *Maryland* v. *Wirtz*, 392 U.S. 183 (1968).[4]

In addition to schools, hospitals, and institutions, the 1966 FLSA amendments extended coverage to employees of all transit companies "engaged in commerce" that are either publicly owned or privately owned but subject to state or local regulation. Pub. L. No. 89-601, § 102(a) and (b), 80 Stat. 831, 29 U.S.C. (1970 ed.) 203(d), 203(r)(2). However, the 1966 FLSA amendments did not provide overtime pay protection to drivers, operators, and conductors ("operating employees") employed by transit companies, public or private, brought under the Act. Pub. L. No. 89-601, § 206(c), 80 Stat. 836, 29 U.S.C. (1970 ed.) 213(b)(7).[5] The plaintiffs in *Mary-*

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[3] The effect of each of these provisions and their interrelationship is explained in *Maryland* v. *Wirtz*, 392 U.S. 183, 185-187 & n.4 (1968).

[4] The Court declined to consider, however, the statutory question whether publicly owned schools, hospitals and institutions characteristically are "engaged in commerce" and are, accordingly, subject to the minimum wage and overtime provisions of the Act, leaving that question open for case by case resolution. *Maryland* v. *Wirtz*, 392 U.S. at 200-201.

[5] In 1961, Congress had extended the FLSA to provide minimum wage and child labor (but not overtime) protection to employees of certain private mass transit operators. See Fair Labor Standards Amendments of 1961, Pub. L. No. 87-30, §§ 2(c) and 9, 75

land v. *Wirtz* did not challenge the public transit employee provisions of the 1966 FLSA amendments, and the Court had no occasion to consider their validity. See *Maryland* v. *Wirtz*, 269 F. Supp. 826, 827 (D. Md. 1967), aff'd, 392 U.S. 183 (1968).

In 1974, Congress again broadened the coverage of the FLSA. This time virtually all public agencies and their employees were brought within the ambit of the Act. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, §§ 6(a)(1), (4), (5)(D) and (E), and (6), 88 Stat. 58-60, 29 U.S.C. 203(d), 203(r)(3), 203(s)(5), and 203(x).[6] The 1974 amendments also established a schedule for phasing out the special exclusion from overtime coverage for operating personnel of transit systems that had been established in the 1966 (and 1961) amendments. Pub. L. No. 93-259, § 21(b)(1)-(3), 88 Stat. 68.

The provisions of the 1974 FLSA amendments applicable to public employment generally were broadly challenged by the states and their political subdivisions. In *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), this Court overruled *Maryland* v. *Wirtz*, and restricted Congress's power to extend the protections of the FLSA to public employees. The Court held that the "constitutional doctrine of intergovernmental immunity" (*id.* at 837) bars application of the minimum wage and overtime provisions of the FLSA to "the States *qua* States" (*id.* at 847), "insofar as the

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Stat. 65-66, 72, 73, 29 U.S.C. (1964 ed.) 203(s)(2), 213(a)(9), 213(b)(7). In 1966, § 203(d) was amended to bring state or local government operated transit systems within the Act's definition of "employer." Section 203(r)(2) was amended in 1966 to make clear that transit operations, whether public or private (but publicly regulated), are "enterprise[s]" within the meaning of the FLSA and, accordingly, that employees of a transit system engaged in commerce are entitled to the protections of the Act.

[6] These provisions and their combined effect are described in *National League of Cities* v. *Usery*, 426 U.S. 833, 838-839 (1976).

challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions" (*id.* at 852).

In overruling *Maryland* v. *Wirtz*, the Court specified that the publicly operated "schools and hospitals involved in *Wirtz* * * * each provide[] an integral portion of those governmental services which the States and their political subdivisions have traditionally afforded their citizens" (426 U.S. at 855 (footnote omitted)). The Court also listed "such areas as fire prevention, police protection, sanitation, public health, and parks and recreation" as other examples of traditional state operations (*id.* at 851, 855). However, the Court did not purport to offer "an exhaustive catalogue of [those] * * * activities * * * which are well within the area of traditional operations of state and local governments" and that accordingly may not be made subject to federal commerce power legislation, where other elements of the test for immunity are satisfied (*id.* at 851 n.16). Because the plaintiffs in *National League of Cities* did not mount a challenge to the public transit provisions of the 1966 and 1974 FLSA amendments, the Court had no occasion to address the constitutionality of those provisions of the Act.

Although the Court thus left unsettled the constitutional validity of federal legislation affecting certain state and local governmental functions, it made clear that not all state activity was insulated from the reach of federal commerce power enactments. Indeed, the Court singled out one activity as outside the scope of the Tenth Amendment's protection: a state's "operation of a railroad engaged in 'common carriage by rail in interstate commerce * * *.'" *National League of Cities* v. *Usery*, 426 U.S. at 854 n.18 (quoting *United States* v. *California*, 297 U.S. 175, 182 (1936)). The Court explained that operation of a railroad was not a service "that the States have regarded as integral parts of their *governmental* activities" (426 U.S. at 854 n.18 (emphasis added)).

On remand for entry of an order implementing this Court's *National League of Cities* decision, the three-judge district court concluded that this Court's decision was "limited to invalidating regulation, under the commerce clause, of the hours and wages of those state and local government employees engaged in activities integral to and traditionally provided by government." *National League of Cities* v. *Marshall*, 429 F. Supp. 703, 705 (D.D.C. 1977). Recognizing the existence of "a gray area, which will require elucidation in the factual settings presented by future cases" (*id.* at 706), and troubled by the possibility that double damages could be sought against state and local governments for FLSA violations (see 29 U.S.C. (Supp. V) 216(b) and (c)), the court concluded that "[i]t may be appropriate to provide some protection to the state and local governments" (429 F. Supp. at 706).

In response to the district court's request, the Secretary of Labor submitted a proposal to amend his statement of FLSA enforcement policy, 29 C.F.R. Pt. 775, so as to provide for listing of government activities deemed to lie outside the scope of the states' Tenth Amendment immunity from application of the FLSA. The Secretary's proposal also indicated that he would not seek double damages for violations as to any period prior to the listing of a government activity as covered by the Act. The Secretary's proposal was approved by the district court (*National League of Cities* v. *Marshall*, 429 F. Supp. at 706) and was published as an interpretative rule. See 29 C.F.R. 775.2(b) and (d) and 775.3(b). Pursuant to the approved procedure, on December 21, 1979, the Secretary of Labor amended his statement of enforcement policy to include local mass transit systems in the category of government activities not integral to a traditional government function and hence subject to the FLSA. See 29 C.F.R. 775.3(b)(3).

2. Appellee San Antonio Metropolitan Transit Authority (SAMTA), is a regional transit authority created pursuant to Tex. Rev. Civ. Stat. Ann. art 1118x (Ver-

non Cum. Supp. 1982) to serve the San Antonio metropolitan area. SAMTA began operations on March 1, 1978, when it acquired the facilities and equipment of the city-owned San Antonio Transit System, which had begun operations in 1959.[7] Prior to 1959 public transportation in San Antonio was provided by a private transit company.

Since its establishment, SAMTA has received substantial federal financial assistance, in the form of grants in aid for capital improvements and operating expenses, as well as technical assistance, under the Urban Mass Transportation Act of 1964 (UMT Act), 49 U.S.C. (& Supp. V) 1601 *et seq.* During the first two fiscal years of SAMTA operations, UMTA provided non-capital grants of approximately $12.5 million, or 30% of SAMTA's total operating expenses.[8] SAMTA's predecessor, the San Antonio Transit System, had also received substantial federal financial aid prior to the SAMTA takeover.[9] During the period December 1970 through February 1980, SAMTA and its predecessors received $51,689,000 in federal grants, or approximately 40% of their total eligible projects costs of $130,922,194. Of this federal assistance, $31,040,080 represented capital grants

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[7] The San Antonio Transit System was operated pursuant to the restrictive terms of a revenue bondholders' indenture with a local bank serving as trustee (J.S. App. 7a n.4; *Urban Mass Transportation: Hearings on H.R. 6663, S. 3154, H.R. 7006 et al. Before the Subcomm. on Housing of the House Comm. on Banking and Currency*, 91st Cong., 2d Sess. 420 (1970) (statement of F. Norman Hill, Manager, San Antonio Transit System) (hereinafter cited as *1970 UMT Act Hearings*)).

[8] Brief in Support of SAMTA's Motion for Summary Judgment 10 (filed Apr. 30, 1980).

[9] It appears that the system met operating expenses and met its obligations to pay principal and interest on its bonds, to make payments in lieu of taxes to the City of San Antonio, and to establish various reserves, without any federal or local subsidy for the first 10 years of its existence (Aff. of Robert Thompson (June 12, 1980) ¶¶ 4-5 and Exh. A & B thereto; *1970 UMT Act Hearings* 420 (statement of F. Norman Hill)).

under Sections 3 and 5 of the UMT Act; $20,620,270 was operating assistance under Section 5; and $28,654 was technical assistance (research, development, and demonstration grants) under Section 6 of the UMT Act.[10]

3. On November 21, 1979, SAMTA filed a complaint in the United States District Court for the Western District of Texas seeking a declaratory judgment that its operations are integral operations of a political subdivision of the State of Texas in an area of traditional governmental functions, and accordingly are exempt, under the rule of *National League of Cities*, from both the minimum wage and overtime provisions of the FLSA.[11] The Secretary of Labor counterclaimed against SAMTA for enforcement of the overtime and record-keeping provisions of the Act. See 29 U.S.C. 217.[12]

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[10] Urban Mass Transportation Administration, Office of Management Information Systems, List of All Grants for the City of San Antonio, Texas (Feb. 25, 1980) (Exh. K to the federal appellant's motion for summary judgment).

In addition, as of 1979, SAMTA had received federal funding commitments for acquisition of 325 buses. Urban Mass Transportation Administration, Major Funding Commitments for Buses (Over 300 Units) Since Feb. 1965, as of Sept. 30, 1979 (Exh. L to the federal appellant's motion for summary judgment).

[11] In its complaint (¶¶ 4-6), filed just before the Secretary published his enforcement policy respecting mass transit (see page 6, *supra*), SAMTA alleged that the Secretary had informally concluded that mass transit operations were not within the sphere of intergovernmental immunity, and that employees of SAMTA had, on this basis, begun to assert a right to receive overtime compensation under the FLSA and had indicated their intention to seek remedial relief under the Act.

[12] SAMTA evidently paid its employees the minimum wage at the time in question. SAMTA's predecessor, the San Antonio Transit System, had paid overtime pursuant to the FLSA from the time the 1974 amendments to the Act went into effect until October 15, 1976, at which time employees were advised that a "recent decision by the Supreme Court of the United States" made it unnecessary for the System to continue to do so (Aff. of Robert Thompson (June 12, 1980) ¶ 13 and Exh. J thereto).

Appellee American Public Transit Association (APTA), a trade association of public transit operators, intervened as a plaintiff, supporting SAMTA, while appellant Joe G. Garcia, a SAMTA employee, intervened as a defendant, supporting the Secretary.

On November 17, 1981, the district court denied the Secretary's motion for partial summary judgment and entered judgment for SAMTA. The court issued no opinion, but its judgment stated (J.S. App. 23a) that local, publicly operated mass transit systems such as SAMTA "constitute integral operations in areas of traditional governmental functions" for purposes of applying the rule of *National League of Cities* v. *Usery*. The district court accordingly concluded that the Secretary may not enforce the minimum wage and overtime pay provisions of the FLSA against SAMTA and other public transit operators.

The Secretary and intervenor-defendant Garcia both appealed to this Court pursuant to 28 U.S.C. 1252. The Court vacated the district court's judgment and remanded the case for further consideration in light of the intervening decision in *United Transportation Union* v. *Long Island R.R.*, 455 U.S. 678 (1982). *Donovan* v. *San Antonio Metropolitan Area Transit Authority*, 457 U.S. 1102 (1982).

4. On remand, the district court adhered to its conclusion that the minimum wage and overtime provisions of the FLSA may not be applied to publicly owned and operated mass transit systems such as SAMTA (J.S. App. 1a-20a). Although the district court acknowledged that "the historical record *is not* one of predominately [*sic*] public ownership and operation of transit services" (J.S. App. 5a (emphasis in original)), it concluded that mass transit "has traditionally been a state prerogative and responsibility" (*id.* at 6a) because transportation related activities such as road building are a traditional public function (*id.* at 4a) and because private transit operations had generally been subject to state or local regulation (*id.* at 5a).

The district court recognized that, under *United Transportation Union* v. *Long Island R.R., supra,* the states cannot invoke Tenth Amendment immunity in circumstances where such immunity would "erode federal authority over previously private functions recently converted to public ownership" (J.S. App. 6a). But the court distinguished *Long Island R.R.* on the ground that the FLSA itself had only in recent years been extended to cover transit employees in the public sector (J.S. App. 7a-8a). Because other federal commerce power legislation, the application of which to transit companies antedated that of the FLSA, expressly exempts public employers from coverage, the district court stated that "[n]o * * * federal authority exists to be eroded in the area of transit" (*id.* at 20a; see also 9a-10a).

Finally, the district court concluded that mass transit cannot satisfactorily be distinguished from fire prevention, police protection and other public services classified as traditional state functions in *National League of Cities* itself (J.S. App. 11a-17a). The court rejected (*id.* at 13a-17a) the view that the critical role played by federal grant funds in stimulating and underwriting the conversion of private transit systems to public ownership differentiates the emerging public role in transit operation from traditional state activities for purposes of delineating the scope of state immunity under the FLSA.

SUMMARY OF ARGUMENT

The decision of the district court effects a novel and unwarranted extension of the doctrine of state immunity from nondiscriminatory federal Commerce Clause legislation. As the courts of appeals have unanimously recognized,[13] the application of the Fair Labor Standards Act

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[13] *Dove* v. *Chattanooga Area Regional Transportation Authority,* 701 F.2d 50 (6th Cir. 1983); *Alewine* v. *City Council,* 699 F.2d 1060 (11th Cir. 1983), petitions for cert. pending, Nos. 82-1974 and 83-257; *Kramer* v. *New Castle Area Transit Authority,* 677 F.2d 308 (3d Cir. 1982), cert. denied, No. 82-701 (Jan. 17, 1983).

to publicly owned transit carriers is constitutionally permissible.

A. In *National League of Cities* v. *Usery*, 426 U.S. 833, 852 (1976), this Court held that the 1974 amendments to the Fair Labor Standards Act, extending the Act's coverage to virtually all state and municipal employees, are unconstitutional "insofar as [they] operate to directly displace the States' freedom to structure integral operations in the areas of *traditional* governmental functions" (emphasis added). While the Court indicated that services such as education and police and fire protection are traditional governmental functions for this purpose and, conversely, that state operation of a railroad is not an immunized function, it did not purport to provide a complete listing of activities falling within (or without) the protected sphere.

In this case, the district court held that local transit service is a traditional government function exempt from application of the FLSA. But that holding is contrary to *National League of Cities* itself, because the historical record shows that until quite recently mass transit, like railroad operation, was a service that the states generally did not undertake to provide. A substantial share of the transit industry remains, even today, in private hands.

The district court did not deny that mass transit historically has been provided by the private sector, with public participation a recent development (see J.S. App. 5a). The court reasoned, however, that immunity should nevertheless be extended to local transit because it is one component of the states' larger transportation systems and because the states have traditionally assumed responsibility for other transportation-related activities, such as road building. This rationale is inconsistent with *United Transportation Union* v. *Long Island R.R.*, 455 U.S. 678 (1981), for the same could have been said of the commuter railroad involved there. Nor, contrary to the district court's alternative rationale, does a history of state *regulation* of private transit carriers establish mass tran-

sit as an *integral* government *operation.* On the contrary, the states' historical choice—regulation subject to preemption by federal legislation such as the FLSA, in preference to public operation—confirms that application of federal wage standards to public transit enterprises does not affect basic state prerogatives in a manner that vitiates the essential sovereignty of the states.

B.1. The manner in which the recent growth of the public sector of the transit industry occurred corroborates this conclusion. The shift toward public operation was substantially assisted and encouraged by the enactment of the Urban Mass Transportation Act of 1964, which made available federal grants covering 80% of the cost of acquiring private transit systems or building new systems. Congress enacted the UMT Act in large measure because it determined (based upon the testimony of state and municipal officials and transit operators) that, absent substantial federal financial assistance, many communities would lose all transit service and others would face severe curtailment of service.

The federal funds provided by the UMT Act enabled many states and localities to acquire privately owned systems. Indeed, appellee APTA has acknowledged that in many cities "federal assistance not only improved transit but saved it from extinction." American Public Transit Association, *Transit Fact Book 1981*, at 30. And the Manager of the San Antonio Transit System, predecessor to appellee SAMTA, told Congress in 1970 that "if we do not receive substantial help from the federal government" San Antonio might "end up with no transportation at all" (see pages 31-32, *infra*). Given this critical federal role in the development of the nationwide public transit industry, it would be peculiar indeed to regard the provision of transit service as the kind of core state function that is beyond the reach of federal commerce power regulation.

2. In *Long Island R.R.*, 455 U.S. at 687, the Court held that the intergovernmental immunity doctrine does not permit the states to erode federal commerce power

authority by "acquiring functions previously performed by the private sector." Yet the district court's decision sanctions just such erosion. At the time that large numbers of local governments began to acquire transit systems, employment relations in the transit industry had long been the subject of federal regulation under the National Labor Relations Act. Congress also had extended the FLSA to transit systems prior to the wave of public takeovers following passage of the UMT Act. By choosing to enter the transit industry, public operators subjected themselves to these enactments.

C.1. Even if mass transit were now to be considered a core governmental function, application of the FLSA to public transit systems would not intrude upon state sovereignty. The impact of the transit provisions of the FLSA does not "portend[] anything like the * * * wide-ranging and profound threat to the structure of State governance" (*EEOC* v. *Wyoming*, No. 81-554 (Mar. 2, 1983), slip op. 13) condemned in *National League of Cities*. Moreover, in accepting federal financial assistance for the purpose of acquiring private transit systems, public transit operators agreed to preserve benefits received by the employees from their private employers—which, in the case of much of the industry, included payment of the federal minimum wage. Finally, because collective bargaining agreements in the transit industry generally required payment of overtime, Congress concluded that phasing out the overtime exemption for public transit operating employees in 1974 would not create an undue burden.

2. The federal interest in application of the FLSA to public transit carriers is a powerful one. In enacting the UMT Act, Congress determined that transit service has an important and direct impact on interstate commerce. Congress determined in addition that public transit systems often are in competition with private carriers and that failure to cover public systems under the FLSA would sanction unfair competition. Congress's "determin[ation] that a uniform regulatory scheme" is

required in this area is entitled to substantial deference. *Long Island R.R.*, 455 U.S. at 688.

3. At the time that FLSA coverage was extended to the public sector of the transit industry in 1966, transit was still predominantly a service provided by the private sector. Thus, given the federal interest in regulating interstate commerce and preventing unfair competition, the constitutionality of these provisions could scarcely have been questioned. But if these provisions were valid when enacted less than two decades ago, they cannot be said to intrude impermissibly upon a core area of local governmental functions today. Any adjustment of the FLSA in light of changed social or economic conditions is a task for Congress, not the courts.

ARGUMENT

APPLICATION OF THE FAIR LABOR STANDARDS ACT TO PUBLIC TRANSIT CARRIERS DOES NOT VIOLATE THE TENTH AMENDMENT

"[L]egislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality" (*Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976)) that dictates "deference to * * * congressional judgments" embodied in the legislation "unless * * * demonstrably arbitrary or irrational" (*Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 84 (1978)). In *National League of Cities* v. *Usery*, 426 U.S. 833, 852 (1976), however, this Court held that the 1974 amendments to the Fair Labor Standards Act that extend minimum wage and overtime protection to virtually all public employees are unconstitutional "insofar as [they] operate to directly displace the States' freedom to structure integral operations in areas of *traditional* governmental functions" (emphasis added).[14] As indicated

[14] The Court repeatedly characterized as "traditional" the state activities upon which the federal legislation was deemed impermissibly to intrude. See, *e.g.*, 426 U.S. at 849 ("[t]he degree to

above (page 5), the Court did not purport to provide an "exhaustive catalogue" of local government activities that fall within the protected sphere, but did single out operation of a railroad as a non-exempt activity.

In *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981), the Court recapitulated the holding of *National League of Cities*, stating (*id.* at 287-288 (footnote omitted; emphasis in original)):

> [I]n order to succeed, a claim that congressional commerce power legislation is invalid under the reasoning of *National League of Cities* must satisfy *each* of three requirements. First, there must be a showing that the challenged statute regulates the "States as States." [426 U.S.] at 854. Second, the federal regulation must address matters that are indisputably "attribute[s] of state sovereignty." *Id.* at 845. And third, it must be apparent that the States' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional governmental functions." *Id.* at 852.

Even where these three requirements are met, a Tenth Amendment challenge to legislation under the Commerce Clause may still fail, because "[t]here are situations in which the nature of the federal interest advanced may be such that it justifies state submission." 452 U.S. at 288 n.29. See also *United Transportation Union* v. *Long Island R.R.*, 455 U.S. at 684 n.9.

Most recently, in *EEOC* v. *Wyoming*, No. 81-554 (Mar. 2, 1983), slip op. 8-9, the Court emphasized that "[t]he

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which the FLSA amendments would interfere with traditional aspects of state sovereignty * * *"), 851 ("services * * * which the States have traditionally afforded their citizens"), 851 n.16 ("activities * * * within the area of traditional operations of state and local governments"), 855 ("those governmental services which the States and their political subdivisions have traditionally afforded their citizens"). See also *id.* at 854 n.18 (operation of a railroad is not "in an area that the States *have regarded* as integral parts of their governmental activities" (emphasis added)).

principle of immunity articulated in *National League of Cities*" does not create "a sacred province of state autonomy" but instead is a "functional doctrine" tailored to "ensure that the unique benefits of a federal system in which the States enjoy a 'separate and independent existence,' [*National League of Cities* v. *Usery*, 426 U.S.] at 845 (quoting *Lane County* v. *Oregon*, 74 U.S. (7 Wall.) 71, 76 (1869)), not be lost through undue federal interference in certain core state functions." The decision of the district court holding the Fair Labor Standards Act unconstitutional as applied to public transit employment is contrary to the limiting principles recognized in these decisions.

A. Operation Of A Transit System Is Not A Traditional Government Function

1. Contrary to the view of the district court (J.S. App. 6a, 11a-17a), provision of mass transit services is distinguishable in critical respects from the "core state functions" such as public education, safety, health, sanitation, parks and hospitals, held to be immune from the operation of the Fair Labor Standards Act in *National League of Cities*. First, mass transit is not a traditional local government function. As the district court acknowledged (*id.* at 5a (emphasis in original; footnote omitted)): "The historical record *is not* one of predominately [*sic*] public ownership and operation of transit services." Similarly, APTA has itself recognized that "[p]ublic ownership of transit is a recent development." American Public Transit Association, *Transit Fact Book* 55 (1978-1979 ed.) (see page 17 note 15, *infra*).

The historical record supports these assessments. Indeed, until the 1960's mass transit had been predominantly performed by the private sector. At the time of World War II, only 20 street railways and bus systems, carrying 7% of the nation's transit riders, were in public ownership. American Public Transit Association,

Transit Fact Book 1981, at 27.[15] Even in 1960, only 64 of the 1251 transit systems extant were publicly owned. *Urban Mass Transportation Act of 1963: Hearings on H.R. 3881 Before the House Comm. on Banking and Currency*, 88th Cong., 1st Sess. 27 (1963) (testimony of Robert Weaver) (hereinafter cited as *1963 UMT Act Hearings*). Mass transit then was still a private enterprise in many of the nation's largest cities, including Atlanta, Baltimore, Buffalo, Cincinnati, Dallas, Denver, Houston, Milwaukee, Minneapolis, New Orleans, Pittsburgh, St. Louis, San Diego and Washington, D.C. *Id.* at 313 (testimony of George W. Anderson, Executive Vice President, American Transit Association).[16]

To be sure, subsequent to the enactment of the Urban Mass Transportation Act of 1964 (UMT Act), 49 U.S.C. (& Supp. V) 1601 *et seq.*, which made substantial federal funds available to local governments for mass transit construction and operation (see pages 7-8, *supra*, and pages 26-28, *infra*), the trend toward public ownership of transit substantially accelerated. In 1967 over 50% of all transit riders patronized publicly owned systems. *Transit Fact Book 1981*, *supra*, at 27. The latest available information is that slightly over half the operating systems, carrying over 94% of the riders, are now publicly owned. *Ibid.* Even so, as late as 1981, half of the

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[15] The 1978-1979 edition of the same reference cites the figure of 35 systems in public ownership, but does not vary the percentage of riders carried. *Transit Fact Book*, *supra*, at 55. We note with interest that APTA, without material revision in the underlying historical data, has revised its assessment of these facts. As indicated above (page 16), the earlier edition of the *Transit Fact Book* concludes that "[p]ublic ownership of transit is a recent development" (*ibid.*). The 1981 edition reverses that judgment, stating: "Public ownership of transit is not a recent development." *Transit Fact Book 1981*, *supra*, at 27.

[16] We note, as well, that until relatively recently many areas had no mass transit, public or private. As of 1963, 60 cities with a population in excess of 25,000 had no such service. *1963 UMT Act Hearings* 330-331 (testimony of George W. Anderson).

nation's urban mass transit systems (336 out of 686) and 91 of 339 systems in rural areas were still privately owned.[17] Moreover, many of the cities that have acquired transit systems in recent years have contracted out responsibility for operation of these systems to private transit management companies, which are in some cases the very companies that previously owned the systems. Of the 350 publicly owned systems in urbanized areas, more than 120 (including some of the larger systems) are privately managed.[18]

As these statistics indicate, mass transit cannot be deemed "an integral portion of those governmental services which the States and their political subdivisions have traditionally afforded their citizens" (*National League of Cities* v. *Usery*, 426 U.S. at 855 (footnote omitted)). Accordingly, the application of the FLSA to require fair wage standards in the public transit industry is not precluded by the doctrine of intergovernmental immunity. *Helvering* v. *Powers*, 293 U.S. 214 (1934),

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[17] U.S. Dep't of Transportation, *A Directory of Regularly Scheduled, Fixed Route, Local Public Transportation Service in Urbanized Areas Over 50,000 Population* 19 (Aug. 1981) (hereinafter cited as *DOT Urban Transit Directory*); U.S. Dep't of Transportation, *A Directory of Regularly Scheduled Fixed Route, Local Rural Public Transportation Service* 13 (Feb. 1981).

[18] *DOT Urban Transit Directory, supra*, at 19; Aff. of Alexander Cohn (May 19, 1980), ¶ 4 and Exh. B thereto.

The widespread use of private transit management companies, many of which are actually the direct employers of the transit system employees, is at least partially attributable to the need to reconcile state law prohibitions upon public employee collective bargaining with the mandate of § 13(c) of the UMT Act, 49 U.S.C. 1609(c), which requires recipients of federal mass transit aid under the Act to make "[s]uch protective arrangements * * * as may be necessary for * * * the continuation of collective bargaining rights." See *Local Div. 1285, Amalgamated Transit Union* v. *Jackson Transit Authority*, 650 F.2d 1379, 1386 (6th Cir. 1981), rev'd on other grounds, 457 U.S. 15 (1982); 43 Fed. Reg. 13558 (1978); *1963 UMT Act Hearings* 264 (statement of Walter J. McCarter, General Manager, Chicago Transit Authority).

is directly in point. There the Court held that the Board of Trustees of the Boston Elevated Railway Company, a quasi-public street railway enterprise, could not share in the intergovernmental tax immunity of the State of Massachusetts because the transit operation was not a traditional government function (*id.* at 227):

> [T]he State, with its own conception of public advantage, is undertaking a business enterprise of a sort that is normally within the reach of the federal taxing power and is distinct from the usual governmental functions that are immune from federal taxation in order to safeguard the necessary independence of the State. * * * [These circumstances] cannot be said to furnish a ground for immunity.[19]

Nor does the recent trend toward public ownership of local transit services justify extension of state immunity under the FLSA to these services. In *United Transportation Union* v. *Long Island R.R.*, 455 U.S. 678 (1982), the Court held that the application of the Railway Labor Act to govern labor relations of a state-owned commuter railroad does not trench impermissibly upon state sovereignty. The Court acknowledged that "some passenger railroads have come under state control in recent years" but emphasized that "that does not alter the historical reality that the operation of railroads is not among the functions *traditionally* performed by state and local governments." 455 U.S. at 686 (emphasis in original). The Court accordingly concluded (*ibid.*):

> Federal regulation of state-owned railroads simply does not impair a state's ability to function as a state.

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[19] In *National League of Cities*, the Court rejected the contention that " 'the activities in which the states have traditionally engaged,' " which had been held to mark the " 'boundary of the restriction upon the federal taxing power,' " do not supply a like " 'limitation upon the plenary power to regulate commerce.' " 426 U.S. at 854, quoting *United States* v. *California*, 297 U.S. 175, 185 (1936). But nothing in *National League of Cities* suggests that Congress's power to regulate commerce is *more* limited than the power to tax state activities. See 426 U.S. at 843-844 n.14.

That conclusion is equally applicable to local public transit systems. Indeed, the Court observed:

> "[T]here [is] certainly no question that a State's operation of a common carrier, even without profit and as a 'public function,' would be subject to federal regulation under the Commerce Clause . . . ."

United Transportation v. *Long Island R.R.*, 455 U.S. at 685 n.11 (quoting *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 422 (1978) (opinion of Burger, C.J.)).

Significantly, a key justification for singling out public transit workers for FLSA coverage in 1966, at a time when public employees generally were not within the Act's protection (see pages 2-4 & note 5, *supra*), was to eliminate the unfair competitive advantage that public transit systems had enjoyed over private systems since the latter had been covered by the Act in 1961. Both the House and Senate Reports underscored that public transit systems, even if "not operated for profit,"

> are engaged in activities which are in substantial competition with similar activities carried on by enterprises organized for a business purpose. *Failure to cover all activities of these enterprises will result in the failure to implement one of the basic purposes of the Act, the elimination of conditions which "constitute an unfair method of competition in commerce."*

H.R. Rep. 1366, 89th Cong., 2d Sess. 16-17 (1966); S. Rep. 1487, 89th Cong., 2d Sess. 8 (1966) (emphasis added).

2. The district court acknowledged that mass transit service traditionally has been provided by private enterprise rather than local government (see page 9, *supra*). The court reasoned, however, that other transportation activities such as road building historically were carried out by states (J.S. App. 4a) and suggested that "[m]ass transit is an integral component of a state's transportation system" (*id.* at 5a). But the same could equally have been said of the commuter railroad in *Long Island*

R.R. Plainly, *National League of Cities* does not require that all employment pertaining in any way to any mode of transportation be treated as a single service in determining whether the application of the wage requirements of the FLSA to public transit operations impairs a state's sovereignty (see page 23 note 22, *infra*). And the historical role of government in road building (see *Molina-Estrada* v. *Puerto Rico Highway Authority*, 680 F.2d 841, 845-846 (1st Cir. 1982)) obviously distinguishes that activity from transit operations.

The district court's alternative rationale for disregarding the lack of a dominant historical tradition of state operation of local transit service was that historic state *regulation* of local transit service suffices to render mass transit "traditionally * * * a state prerogative and responsibility" (J.S. App. 6a). The court declared (*ibid.*):

> That states chose to leave ownership and operation in private hands and to effect their interest through regulation does not negate the inference of sovereignty that arises from history.

This reasoning, which fundamentally misconceives the premise of *National League of Cities*, cannot be reconciled with this Court's decisions. Congress's authority to override state regulation by exercise of its commerce power is well established and is not limited by considerations of state sovereignty. *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. at 289-292. Thus, preemption of state regulatory authority by enactment of the FLSA amendments of 1961, 1966 and 1974 did not run afoul of the Tenth Amendment. Such federal legislation neither "regulates the 'states as states'" (*Hodel* v. *Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. at 287 (quoting *National League of Cities*, 426 U.S. at 854)), nor "affects basic *state* prerogatives in such a way as would be likely to hamper the state government's ability to fulfill its role in the Union and endanger its 'separate and independent existence'" (*United Transportation Union* v. *Long Island R.R.*, 455

U.S. 686-687 (quoting *National League of Cities*, 426 U.S. at 851) (emphasis added)). Cf. *Bus Employees, Div. 998* v. *Wisconsin Employment Relations Board*, 340 U.S. 383, 397-398 (1951).[20]

A history of state regulation of private transit enterprise simply cannot be regarded as the equivalent of state operation of transit services for this purpose and provides no predicate for treating transit services recently taken over by a public entity as a traditional and essential element of state sovereignty. See *Div. 1287, Bus Employees* v. *Missouri*, 374 U.S. 74 (1963);[21] *Jefferson County Pharmaceutical Ass'n, Inc.* v. *Abbott Labora-*

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[20] In *Bus Employees, Div. 998* v. *Wisconsin Employment Relations Board*, 340 U.S. at 397-398, the Court rejected the claim that the substantial local interest in the affairs of a private bus company, operated as a public utility under state regulation, precluded application of the National Labor Relations Act to a labor dispute between the utility and its employees, explaining "these questions are for legislative determination" (*id.* at 397). Thus, contrary to the district court's suggestion (J.S. App. 6a), the states do not enjoy freedom "to select the most suitable means to accomplish their goals in areas of unique and special concern to them" without regard to federal legislation regulating commerce. A similar argument was presented, without success, in *Long Island R.R.* See 80-1925 Resp. Br. 11, 13-14, 27-28. And *EEOC* v. *Wyoming* expressly rejects the contention that *National League of Cities* artificially delimits any such "sacred province of state autonomy" (slip op. 9).

[21] In *Div. 1287, Bus Employees* v. *Missouri*, the Court held that despite seizure of a privately operated local transit company by the governor of the state, the state court's authority to enjoin a strike was preempted by the National Labor Relations Act. Explaining that the seizure did not render the public employment exception to the coverage of the NLRA applicable, the Court observed (374 U.S. at 81):

> [T]he State's involvement fell far short of creating a state-owned and operated utility * * *. The employees of the company did not become employees of Missouri. Missouri did not pay their wages, and did not direct or supervise their duties. No property of the company was actually conveyed, transferred, or otherwise turned over to the State. Missouri did not participate in any way in the actual management of the company * * *.

tories, No. 81-827 (Feb. 23, 1983);[22] cf. *Reeves, Inc.* v. *Stake*, 447 U.S. 429, 436-437 (1980) ("The basic distinction drawn in [*Hughes* v.] *Alexandria Scrap* [*Corp.*, 426 U.S. 794 (1976)] between States as market participants and States as market regulators makes good sense and sound law"); *White* v. *Massachusetts Council of Construction Employers, Inc.*, No. 81-1003 (Feb. 28, 1983), slip op. 3.[23] On the contrary, the states' funda-

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[22] In *Jefferson County Pharmaceutical Ass'n*, the Court observed that "[t]he retail sale of pharmaceutical drugs is not 'indisputably' an attribute of state sovereignty," and declared that such state proprietary activities are subject to federal antitrust laws enacted under the Commerce Clause (slip op. 3 n.6 (quoting *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. at 288)). Yet regulation of retail drug sales by private pharmacists (to the extent not preempted by federal law) is assuredly a traditional police power function. See *Whalen* v. *Roe*, 429 U.S. 589, 596-598 (1977). Plainly, the Court did not regard regulation and direct market participation by the state as interchangeable for purposes of Tenth Amendment analysis. The Court indicated, moreover, that the scope of any Tenth Amendment immunity that might attach to state purchases of drugs for use "in traditional governmental functions" must be closely tailored to the scope of those traditional services. *Jefferson County Pharmaceutical Ass'n*, slip op. 3 & n.6.

[23] The cited cases establish that when the states affect "commercial transactions not as 'regulators' but as 'market participants'" (*White* v. *Massachusetts Council of Construction Employees*, slip op. 2), they are freed of the special inhibitions the Commerce Clause places upon state "measures impeding free private trade in the national marketplace" (*Reeves, Inc.* v. *Stake*, 447 U.S. at 437). Our submission in this case is simply that when a state acts in the latter capacity as a participant in the market for transportation services, it necessarily submits itself to the separate restraints that Congress may affirmatively impose upon such market participants pursuant to its plenary power under the Commerce Clause. There is no justification for allowing the states to immunize themselves entirely from the operation of the Commerce Clause by claiming the benefits of acting in the capacity of a market participant without accepting the correlative responsibilities. Indeed, in *Reeves* itself the Court recognized that, notwithstanding the Tenth Amendment and intergovernmental tax immunity doctrines that shield the states, "state proprietary activities may be, and often are, burdened with the same restrictions imposed on private

mental policy decision to pursue their objectives through regulation of nongovernment transit providers rather than direct market participation eloquently testifies that, since the inception of the industry, operation of local transit has "not [been] an area that the States have regarded as *integral* parts of their governmental activities" (*National League of Cities* v. *Usery*, 426 U.S. at 854 n.18 (emphasis added)).

B. Operation Of A Transit System Is Not A Core Government Function That Must Be Exempted From Federal Commerce Power Legislation To Preserve The States' Independence

As we have noted (see page 19, *supra*), the Court held in *Long Island R.R.* that the "historical reality" of private rather than state operation of common carriers establishes that federal commerce power legislation affecting state or local government owned carriers "does not impair a state's ability to function as a state" (455 U.S. at 685, 686). In light of this holding, the historical evidence recounted above (pages 16-18) dictates that the application of the FLSA to public transit employment must be upheld, without more. But even if further analysis is undertaken, the same result follows.

As appellees emphasize (APTA Mot. to Aff. 13; SAMTA Mot. to Aff. 19-20), in *Long Island R.R.* the Court eschewed a blindly historical test for determining whether particular state governmental functions are entitled to immunity from federal commerce power legislation, stating:

> This Court's emphasis on traditional governmental functions and traditional aspects of state sovereignty was not meant to impose a static historical view of state functions generally immune from federal regu-

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market participants." 447 U.S. at 439 & n.13. It was from this premise that the Court reasoned that "[e]venhandedness suggests that, when acting as proprietors, States should similarly share existing freedoms from * * * the inherent limits of the Commerce Clause" upon state regulatory action. *Id.* at 439.

> lation. Rather it is meant to require an inquiry into whether the federal regulation affects basic state prerogatives in such a way as would be likely to hamper the state government's ability to fulfill its role in the Union and endanger its "separate and independent existence."

455 U.S. at 686-687, quoting *National League of Cities*, 426 U.S. at 851. But plainly the Court did not intend to discount the significance of the historical record for this purpose, for the Court's observation that "[f]ederal regulation of a state-owned railroad simply does not impair a state's ability to function as a state" was premised directly upon "the *historical* reality that the operation of railroads is not among the functions *traditionally* performed by state and local governments" (455 U.S. at 686 (emphasis added)). Rather, we take the teaching of *Long Island R.R.* to be that primacy is assigned to historical evidence in the Tenth Amendment analysis because such evidence measures objectively whether a federal enactment unduly interferes with state sovereignty. On the other hand, changing circumstances—such as technological development that makes possible the provision of a service that is genuinely new, rather than merely new to government—may at times warrant characterization of a non-traditional activity as an integral attribute of state sovereignty insulated against Acts of Congress that displace fundamental state decisions. We do not quarrel with the latter proposition. It has no bearing upon this case, however, because, as we have explained, when technology made possible the development of mechanized transit service in the United States, that service emerged under the aegis of private enterprise, and transit typically remained within the private sector for more than a half-century, at least into the 1960's.

Under *Long Island R.R.*, then, a municipal activity that fails to pass the historical test for immunized status may still be the subject of a Tenth Amendment claim. But without the aid of any presumption based upon

historical state responsibility for the service, such a challenge to federal commerce power legislation under the Tenth Amendment must overcome the heavy burden of demonstrating directly that state independence is substantially undermined by application of the federal legislation to the non-traditional state activity. Appellees cannot make such a showing because the circumstances under which the recent growth of public ownership of local transit systems occurred confirm that application of the FLSA to public transit systems does not affect a "core state function" in a manner inconsistent with the separate and independent existence of the states.

1. *The Growth Of Public Transit Service Reflects Cooperative Federalism, Not Independent State Initiatives*

a. The recent conversion of transit systems from private to public ownership was by no means a grass roots or local phenomenon. Rather, that shift was spurred by enactment of the Urban Mass Transportation Act of 1964, 49 U.S.C. (& Supp. V) 1601 *et seq.*, which made available substantial federal financing for public acquisition of private systems and construction of new systems and facilities. By 1964 Congress had recognized the "deterioration or inadequate provision of urban transportation facilities and services" (49 U.S.C. 1601(a)(2)), and had concluded that "[m]ass transportation needs have outstripped the present resources of the cities and States, and [that] a nationwide program can substantially assist in solving transportation problems." H.R. Rep. 204, 88th Cong., 1st Sess. 4 (1963). As the Court observed in *Jackson Transit Authority* v. *Local Div. 1285, Amalgamated Transit Union*, 457 U.S. 15, 17 (1982) (emphasis added):

> When the Act was under consideration in the Congress, that body was aware of the increasingly precarious financial condition of a number of private transportation companies across the country, and *it feared that communities might be left without ade-*

quate mass transportation. See S. Rep. No. 82, 88th Cong., 1st Sess. 4-5, 19-20 (1963). The Act was designed in part to provide federal aid for local governments in acquiring failing private transit companies, so that communities could continue to receive the benefits of mass transportation despite the collapse of private operations. See §§ 2(b) and 3, as amended, 49 U.S.C. §§ 1601(b) and 1602.

The UMT Act established a framework "to provide assistance to State and local governments and their instrumentalities in financing [mass transit] systems, to be operated by public or private mass transportation companies as determined by local needs." 49 U.S.C. 1601(b)(3). Under the provisions of the UMT Act, local government bodies with transit responsibilities are eligible to receive federal grants defraying 80% of their capital outlays, including the costs of acquiring local private systems and making capital improvements and the costs of building new facilities from scratch, as well as up to 50% of their operating expenses. 49 U.S.C. (& Supp. V) 1603(a), 1604(e).[24]

Substantial federal aid has been provided to local public transit systems pursuant to the UMT Act. By 1978 more than $13 billion in aid had been awarded under the UMT Act and other federal programs. *Transit Fact Book* 57 (1978-1979 ed.). In fiscal year 1980 alone, $3.9 billion was provided, including 498 operating assistance grants totalling $1.12 billion. *Transit Fact Book 1981*, *supra*, at 67 (table 19), 68 (table 20). Nationwide, federal revenues covered 17.3% of all operating expenses of public transit systems in 1980, 30.2% of all subsidies for farebox revenues. *Transit Fact Book 1981*, *supra*, at 29, 30. More strikingly, as APTA has acknowledged, "[a]lmost all transit capital revenue is * * * received from

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[24] Authorization for operating expense subsidies was provided by § 103 of the National Mass Transportation Assistance Act of 1974, Pub. L. No. 93-503, 88 Stat. 1568, which revised § 5 of the UMT Act, adding § 5(d)(1) and (e) thereto, 49 U.S.C. 1604(d)(1) and (e).

government agencies." *Id.* at 29. Thus, in 1980 alone, "the federal government contributed 2.8 billion dollars toward the purchase of transit capital equipment" while state and local governments apparently contributed only the statutory matching share required by federal law as a condition of the award of federal assistance. *Ibid.*; see 49 U.S.C. 1604(e). Federal capital grants exceeded $2 billion annually in fiscal 1978 and 1979. *Transit Fact Book 1981, supra*, 67 (table 19).[25] As indicated above (pages 7-8), both SAMTA and its predecessor, the San Antonio Transit System, were beneficiaries of large amounts of federal financial assistance.

The enactment of the UMT Act in 1964 heralded the substantial expansion of the state and local governmental role in providing urban transit described above (pages 17-18). Although it is impossible to state with assurance what would have happened had federal funding not been made available, there is reason to believe that many cities would not have entered the transit business; certainly they had not generally undertaken to perform that service before the advent of federal financing. As the Court noted in *Jackson Transit*, 457 U.S. at 17, it was Congress's conclusion that absent a dramatic infusion of federal funds many communities would simply lose all local transit service. Indeed, the Senate Report highlighted statistics compiled by the American Transit Association reflecting that at least 194 privately operated local transit systems had been abandoned in the nine year period following January 1, 1954, and emphasized the multiple problems caused by abandonment of transit systems and transit rights-of-way. S. Rep. 82, 88th Cong., 1st Sess. 4-5 (1963). The House Report was similarly concerned

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[25] According to APTA, equipment and facilities funded with capital assistance from the federal government during the period 1964-1980 included: 42,692 motor buses, 678 trolley coaches, 3,218 heavy rail cars, 497 light rail cars, 1,720 commuter railroad cars, 96 commuter railroad locomotives, and 16 ferry boats, plus over 250 miles of rail lines (not counting mileage or entire systems as yet in the planning stage). *Transit Fact Book 1981, supra*, at 30.

with "abandonment of individual lines or entire systems in some communities" (H.R. Rep. 204, *supra*, at 4), and predicted that without enactment of the proposed bill "additional essential rights-of-way undoubtedly will be abandoned" (*ibid.*).

The statements of local officials and industry representatives indicate that they shared Congress's apprehension that if federal assistance was not forthcoming widespread curtailment, deterioration and abandonment of mass transit service would result. Governor Peabody of Massachusetts informed Congress:

> [W]e are fully aware of the dire straits and consequent need for improvement of public transportation in the smaller urban portions of the Commonwealth as well as in the Greater Boston area. The private bus industry is clearly in grave financial difficulty and many communities outside of the core Boston area have already lost or are in danger of losing what public transportation facilities they now possess.

1963 UMT Act Hearings 91. Governor Peabody frankly acknowledged the dependency of the states upon federal assistance to carry out an essential program of modernization and expansion of existing facilities (*ibid.*):

> We also know that just as we would have been incapable of carrying out our highway program without the assistance of 90-10 and 50-50 Federal grants, we cannot make the proper capital investment in public transportation facilities without some similar Federal assistance.

The director of the Atlanta Region Metropolitan Planning Commission, which was then planning to construct a new rapid transit system, made clear that such new systems had an equally pressing need for federal assistance:

> [I]t is generally assumed in Atlanta that the achievement of a completely balanced transportation system cannot be attained without a balanced Federal aid program for transportation * * *.

> It is clear that the magnitude of the initial public expenditures necessary for rapid transit will make it very difficult for the local governments. Without Federal aid, rapid transit will be realized only in the distant future.

1963 UMT Act Hearings 398 (statement of Glenn E. Bennett). The American Transit Association presented a compilation reflecting that more than 100 cities had lost all mass transit service because of abandonment of private systems in the period following 1954. *Id.* at 316-329. Other witnesses agreed that absent federal aid many systems would be abandoned, leaving the cities formerly served totally without service, while other systems would progressively decline, offering extremely limited and unattractive service.[28]

Events in the aftermath of the enactment of the UMT Act strongly suggest the substantial difference made by the availability of federal funds for municipal acquisition of existing transit systems or creation of new ones. Whereas on the eve of the adoption of the UMT Act only 5% of all existing transit systems were publicly owned, after a decade and a half of massive federal assistance to states and local governments roughly half of the operating systems in urban areas had passed into public ownership. See pages 17-18, *supra*. As early as September 1976, some 115 cities had employed UMT Act funds to acquire local private bus systems. F. Siskind and E. Stromsdorfer, *The Economic Cost Impact of the Labor Protection Provisions of the Urban Mass Transit Act of 1964*, at 9-11 (May 1978). Moreover, transit operators

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[28] *1963 UMT Act Hearings* 93 (Joseph F. Maloney, Director, Massachusetts Mass Transportation Commission), 190 (W. Elmer George, Director, Georgia Municipal Association), 193 (Adrien J. Falk, Chairman, San Francisco Bay Area Transit District), 204-206 (W.P. Coliton, President, Chicago South Shore & South Bend R.R.), 248 (Otto Kerner, Governor of Illinois), 295, 297, 299, 302 (Richard L. Lich, Railway Progress Institute), 314, 330 (George W. Anderson, Executive Vice President, American Transit Association), 339-340 (A.L. de Mayo, Treasurer, American Transit Corp.), 377 (James W. Symes, Chairman, Pennsylvania R.R.).

have frankly acknowledged the critical role played by federal grant assistance. For instance, in *Alewine* v. *City Council*, 699 F.2d 1060, 1063 (11th Cir. 1983), petitions for cert. pending, No. 82-1974 (filed June 3, 1983) and No. 83-257 (filed Sept. 9, 1983), the City of Augusta, Georgia, "stipulated that had it not been for the federal grant it would not have purchased the assets of the Augusta Coach Company." And APTA itself has acknowledged that federal funds were

> used by many cities [during the 1960's] to buy the vehicles and facilities owned by private transit systems that were on the verge of bankruptcy. *In those cities federal assistance not only improved transit but saved it from extinction.*

Transit Fact Book 1981, *supra*, at 29-30 (emphasis added). The Court described an example of this pattern in *Jackson Transit*, 457 U.S. at 18:

> In 1966, petitioner city of Jackson, Tenn., applied for federal aid to convert a failing private bus company into a public entity, petitioner Jackson Transit Authority.

The history of public transit in San Antonio is no exception to the general pattern. SAMTA did not enter into operations until long after the enactment of the UMT Act, and has received the benefit of extensive federal capital and operating assistance. Although appellee's predecessor, the San Antonio Transit System, was created before the era of federal funding, when it became unable to cover its costs from the fare box it, too, was the beneficiary of substantial federal assistance. See pages 7-8, *supra*. In 1970 the General Manager of the San Antonio Transit System explained to Congress the likely consequences if federal aid were not made available:

> [I]f we do not receive substantial help from the Federal Government, San Antonio may drop out of th[e] small list of public authorities * * * who are paying their own way out of revenues from the fare

> box and join the growing ranks of cities that have inferior transportation or may end up with no transportation at all.

Urban Mass Transportation: Hearings on H.R. 6663, S. 3154, H.R. 7006 et al. Before the Subcomm. on Housing of the House Comm. on Banking and Currency, 91st Cong., 2d Sess. 419 (1970) (statement of F. Norman Hill).

The federal role in mass transit was not limited to underwriting the substitution of public agencies for private transit companies, modernization of existing systems and creation of new transit systems. Prior to the enactment of the UMT Act, "[a]s suburban development increased, the tendency was for each community to maintain its political and fiscal individuality and shun comprehensive urban transportation planning." American Public Works Association, *History of Public Works in the U.S. 1776-1976*, at 178 (1976); see also *1963 UMT Act Hearings* 92 (statement of Richard Sullivan); *id.* at 94 (statement of Joseph F. Maloney). The UMT Act, however, was intended to "encourage the planning and establishment of *areawide* urban mass transportation systems." 49 U.S.C. 1601(b)(2) (emphasis added). Congress made funding available for a project only if it was designed as part of a comprehensive areawide plan, meeting federal criteria for improved transportation, and provided that grants could only be made to public agencies that had the legal and financial authority to carry out such projects. See 49 U.S.C. (Supp. V) 1602(a)(2)(A), 1604(b), 1604(g), and 1607; H.R. Rep. 204, *supra*, at 14. By means of these requirements, local governments were induced, in many instances for the first time, to band together and to create metropolitan transit systems spanning the entire urban area.[27] Thus, far from being in-

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[27] SAMTA was created in 1978, to serve Bexar County, Texas, pursuant to Tex. Rev. Civ. Stat. Ann. art. 1118x (Vernon Cum. Supp. 1982), which authorized creation of metropolitan area-wide transit authorities. Article 1118x was first enacted in 1973.

tegral to the functioning of state and local governments, the very shape of transit systems as they exist today reflects the imprint of *federal* policy.

The transfer of responsibility for providing local transit service thus established not a new integral aspect of state or local government, but a classic venture in "cooperative federalism." See *FERC* v. *Mississippi*, 456 U.S. 742, 764-767 (1982); *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. at 289. Given the critical role played by the federal government in the development of a nationwide public transit industry, it can hardly be claimed that, although non-traditional, operation of local transit by the states and their subdivisions has become a "core state function" that cannot be subjected to federal legislation establishing fair minimum wage standards without destroying the states' "separate and independent existence." Compare *EEOC* v. *Wyoming*, slip op. 9; *United Transportation Union* v. *Long Island R.R.*, 455 U.S. at 686-687. As the Sixth Circuit has remarked: "It would indeed be peculiar to hold that federal aid for transit created a situation where a state which provides transit service is immune from federal labor regulations." *Dove* v. *Chattanooga Area Regional Transportation Authority*, 701 F.2d at 53.

b. The district court concluded that federal funding is irrelevant to the question of intergovernmental immunity (J.S. App. 13a-16a). The court below reasoned that: (1) federal subsidies are an exercise of Congress's Spending Power rather than its Commerce Clause authority, (2) federal monies support many of the functions treated as core aspects of sovereignty in *National League of Cities*, and (3) federal funding, because variable, cannot measure the extent of a state's Tenth Amendment immunity. Appellants have echoed these themes (APTA Mot. to Aff. 23-27; SAMTA Mot. to Aff. 12-14, 24-27). But these observations do not support the decision below.

1. It is immaterial that federal wage legislation respecting mass transit does not itself rest upon Congress's

Spending Power. Federal funding is pertinent in this case not because it supplies the constitutional basis for imposing conditions directly upon the states, but simply because the extensive involvement of the federal government in the growth of public transit is a historical fact that indicates that mass transit—even though it has shifted partly into the public sector—still is not a "core state function" that must be shielded from the federal minimum wage and overtime laws in order to preserve the states' "*separate* and *independent* existence" (*National League of Cities* v. *Usery*, 426 U.S. at 851 (emphasis added)).

2. The role played by federal funding and other requirements of federal law in the public transit industry is significantly different from that of federal grants supporting certain traditional local government functions. To be sure, federal monies are available for education, public safety, and public health activities undertaken by the states. But the federal share of total local expenditures in those areas is generally far less significant than the federal share of expenditures in public transit, particularly in respect to capital costs. For instance, while the federal government typically supplies 80% of all capital construction and facility acquisition costs for public transit, and has supplied a larger share of operating subsidies than state government in many recent years (see *Transit Fact Book 1981*, *supra*, at 29), "[t]he Federal Government has traditionally played a limited role in financing education" (*Budget of the U.S. Government Fiscal Year 1984*, H. Doc. 98-3, 98th Cong., 1st Sess. 5-86 (1983)). Federal funds provide less than 10% of all revenues for public elementary and secondary schools. See, *e.g.*, Bureau of the Census, *Statistical Abstract of the U.S. 1982-83*, at 156 (table 252); Bureau of the Census, *Statistical Abstract of the U.S. 1980*, 161 (table 263). Moreover, while public education had a venerable tradition in the United States by the time of en-

actment of the Fair Labor Standards Act in 1938, federal aid to education constituted only a bit more than 1% of all revenues for public elementary and secondary education in that year. Bureau of the Census, *Historical Statistics of the U.S.*, Pt. 1, 373 (series H 486, 488) (1975) (*Historical Statistics*). In 1918, the earliest date for which federal aid to local education is recorded by the Census Bureau, federal aid was .2% of local school revenues. *Ibid.*[28]

More important, though, than the high level of federal financial assistance to public transit operations is the special role that federal assistance played as a catalyst in the conversion of transit systems from the private to the public sector in many localities. See pages 28-32, *supra*. Neither the district court nor appellees have suggested that federal assistance played even a remotely comparable role respecting any of the other activities recognized as traditional state and local government functions in *National League of Cities*. On the contrary, police and fire protection, public education and public hospitals were provided by municipalities long before federal aid became available. We may therefore conclude that such services indeed are "functions such as th[o]se which [state and local] governments are created to provide" (*National League of Cities*, 426 U.S. at 851). By contrast, history shows that transit is not within the unique competence or responsibility of local governments,

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[28] Similarly, while $716 million was earmarked for federal law enforcement assistance to local governments in the 1977 budget, *National League of Cities*, 426 U.S. at 878 (Brennan, J., dissenting), state and local government criminal justice system expenditures in that year totalled $18.8 billion. *Statistical Abstract of the U.S. 1980*, *supra*, at 192 (table 324). In 1938, federal expenditures for policing activities (the bulk—if not all—of which was presumably direct federal expenditures rather than aid to states) totalled $19 million, whereas state and local government expenditures were $359 million; in 1902 federal policing expenditures were negligible whereas local governments spent $50 million on law enforcement. *Historical Statistics*, *supra*, at 416 (series H 1013, 1017, 1021, 1025).

but is a service that many states were either unwilling or unable to provide absent substantial federal funds. The UMT Act itself is based upon Congress's determination, following extensive hearings, that mass transportation had become a national, rather than a purely local, problem that had "outstripped the present resources of the cities and States," H.R. Rep. 204, *supra*, at 4; see also *1963 UMT Act Hearings* 17 (statement of Robert C. Weaver), and that federal aid was "essential" (49 U.S.C. 1601(a)(3)) if the problem was to be solved. This congressional determination, to which deference is due, distinguishes the public transit industry from the core local government functions whose status was addressed in *National League of Cities*.[29]

SAMTA suggests (Mot. to Aff. 24-26) that transit systems are indistinguishable from public hospitals, which the Court in *National League of Cities* held to be exempt from the application of the FLSA, see 426 U.S. at 855, because the hospital industry remains predominantly in the private sector, and because hospital construction has received substantial federal assistance. The largest sector of the hospital industry undoubtedly is in private hands. But the pertinent point is that pub-

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[29] There are, of course, other examples of municipal activities heavily funded by the federal government, for instance construction of sewage treatment plants (see APTA Mot. to Aff. 24 n.35). But federal funding did not support transformation of sewage treatment from a private sector responsibility to a local public responsibility, as it did transit. Moreover, because sewage treatment has never been a private sector responsibility, there is no problem of unfair competition between government and private enterprise such as impelled Congress to extend FLSA coverage to public transit employees (see page 20, *supra*). Additionally, Congress has never determined that special attributes of sewage treatment service warrant extension of FLSA coverage to public employees in that field, separate and apart from public employees generally, as it has done in the case of public transit. There is no need in this case to consider whether application of the FLSA to other state enterprises receiving federal financial assistance would offend the doctrine of intergovernmental immunity.

lic hospitals constitute a vigorous independent national tradition of long standing in the United States.[30] This Court has determined that public "schools and hospitals provide[] an integral portion of those government services which the states and their political subdivisions have *traditionally* afforded their citizens." *National League of Cities*, 426 U.S. at 855 (emphasis added); see also *Jefferson County Pharmaceutical Ass'n, Inc.* v. *Abbott Laboratories*, slip op. 3-4 & nn. 6 & 7. There is no evidence that the public hospital sector was created by state and local government acquisitions of formerly private enterprises, much less that such transfers were underwritten with federal funds. On the contrary, as SAMTA acknowledges (Mot. to Aff. 25), the trend, if anything, is in the opposite direction. Moreover, to the extent that hospital services were provided by nongovernment entities in the past (and present), the major providers were churches and other nonprofit organizations, rather than private profit making enterprises. See note 30, *supra*. Thus, there is simply no factual basis for the analogy SAMTA would draw between public transit operations and public hospitals.

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[30] For instance, in 1923, there were 601 state hospitals with 302,208 beds, and 915 locally owned hospitals with 115,871 beds (along with 220 federal hospitals with 53,869 beds) in operation, compared with 1,762 (much smaller) proprietary hospitals with only 45,719 beds. Far more significant than the proprietary sector in terms of services provided was the nonprofit sector, with 77,941 beds in 893 church operated hospitals, and 160,114 beds in 2,439 other nonprofit hospitals. *Historical Statistics*, *supra*, at 79 (series B 345-358). In 1980, there were a total of 5,904 short-term care nonfederal hospitals in operation. 1,835 were operated by state and local government; only 730 were operated on a for-profit basis. The balance, 3,339 hospitals, were operated by nongovernmental nonprofit organizations. The foregoing state and local hospitals had 212,000 beds and 602,000 employees, while the proprietary sector had only 87,000 beds and 189,000 employees. The nonprofit hospitals had the lion's share, 693,000 beds and over 2 million employees. *Statistical Abstract of the U.S. 1982-83*, *supra*, at 112 (table 173).

3. The district court also suggested (J.S. App. 16a) that the potential for reevaluation of federal priorities leading to reduction of federal assistance to public transit makes it inappropriate to consider the role of federal financial assistance. But this suggestion again mistakes the significance of federal funding for purposes of the pertinent constitutional analysis. As we have explained (page 34), we do not seek to defend the application of the FLSA on the basis of the Spending Power. Even if federal aid were reduced or eliminated, the critical role played by federal assistance, particularly capital grants, in making it possible for large numbers of municipalities to enter the transit field could not be gainsaid. Furthermore, the district court's observation that federal aid could be terminated is one-sided. State and local spending decisions are, like federal funding, "responsive to changing political demands" (J.S. App. 16a). Similar considerations of political responsibility and intergovernmental comity influence the policies of both partners.

In any event, there is no reason to believe that federal assistance to mass transit is about to be terminated. Over $3.5 billion in federal funds was actually expended in this area in 1982, and budgetary authority of $4 billion was proposed for fiscal year 1984. See *Budget of the U.S. Government Fiscal Year 1984*, *supra*, at 5-66, 5-68 to 5-69. Moreover, the enactment of the Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, 96 Stat. 2097, provides a new secure funding source for mass transit by dedicating one cent per gallon of the recent gasoline tax increase to mass transit capital projects and creating a grant program, funded from general revenues, for capital and operating assistance.[31]

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[31] See Pub. L. No. 97-424, §§ 301-304, 511, 531, 96 Stat. 2140-2150, 2169, 2187-2192; H.R. Conf. Rep. 97-987, 97th Cong., 2d Sess. 149-157, 161-163, 191-193 (1982); H.R. Rep. 97-555, 97th Cong., 2d Sess. 2, 4, 35-42 (1982); *Budget of the U.S. Government Fiscal Year 1984*, *supra*, at 5-68 to 5-69; *id.* at App. I-Q23 to I-Q27.

2. *Extension Of Intergovernmental Immunity To Public Transit Systems Would Erode Federal Authority To Regulate Commerce*

a. The comparatively recent development of substantial public ownership in the mass transit industry serves to distinguish public transit from the governmental activities held exempt from application of the FLSA in *National League of Cities* in an additional respect. The states and their subdivisions entered the fields of police and fire protection, public health and sanitation services, hospitals and education long before the enactment of federal legislation governing terms of employment. And for more than 30 years after the FLSA was adopted Congress recognized the prerogatives of the states in these spheres. The vice of the 1974 amendments to the FLSA thus was the abrupt federal intrusion affecting the entire range of settled patterns of local and state government administration. See 426 U.S. at 845-852; *EEOC* v. *Wyoming*, slip op. 12-13.

In contrast, employment relationships in the private transit industry had long been the subject of federal regulatory legislation under the Commerce Clause when, in the 1960's, local governments began in large numbers to acquire transit systems. The nation's basic labor-management relations statute, the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, enacted in 1935, applies to the private transit industry just as it does to other industries affecting commerce. See *Bus Employees, Div. 998* v. *Wisconsin Employment Relations Board, supra*; *Div. 1287, Bus Employees* v. *Missouri, supra.* Furthermore, as Congress expanded the scope of national labor legislation, it applied a broad range of federal laws to the private transit industry, including the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. (& Supp. V) 401 *et seq.* (reporting requirements); the Fair Labor Standards Amendments of 1961 (minimum wage and child labor standards; see page 3, note 5, *supra*); the Equal Pay Act of 1963, 29 U.S.C. 206(d)

(equal pay for women for equal work); Title VII of the Civil Rights Act of 1964, 42 U.S.C. (& Supp. V) 2000e *et seq.* (prohibition against employment discrimination on the basis of race, sex, creed, or national origin); and the Fair Labor Standards Amendments of 1966 (minimum wage; overtime pay for non-operating employees; see page 3 & note 5, *supra*). These statutes reached the majority of all transit systems, 90% of which were still privately owned in 1967. *Transit Fact Book*, *supra*, at 38. Thus, when they assumed ownership of private transit companies, states and local governments entered an industry in which employment relations were subject to established federal legislation.

Because of this significant federal regulatory presence, a municipality deciding to operate a mass transit system "subjects itself to that regulation." *Parden* v. *Terminal Ry.*, 377 U.S. 184, 196 (1964); *New York* v. *United States*, 326 U.S. 572, 582 (1946) (opinion of Frankfurter, J.); *Helvering* v. *Powers*, 293 U.S. at 225 (see pages 18-19, *supra*); see also *Massachusetts* v. *United States*, 435 U.S. 444, 457-458 (1978) (opinion of Brennan, J.). This principle was recently reaffirmed in *Long Island R.R.* Citing the history of federal regulation of the private rail industry, the Court declared (455 U.S. at 687):

> [T]here is no justification for a rule which would allow the states, by acquiring functions previously performed by the private sector, to erode federal authority in areas traditionally subject to federal statutory regulation.

In *Kramer* v. *New Castle Area Transit Authority*, 677 F.2d at 310, the court of appeals accordingly concluded:

> [S]ince it is undisputed that the national government can set the employment relations in the area of mass transit, it would be unjustified to allow the states, by acquiring functions previously performed by the private sector, to erode federal authority in this area.

Accord: *Dove* v. *Chattanooga Area Regional Transportation Authority*, 701 F.2d at 53.

The district court determined, however, that exemption of public transit employment from the requirements of the FLSA would not entail the kind of erosion of federal authority condemned in *Long Island R.R.* (J.S. App. 6a-11a). The court noted that the FLSA was not applied to private transit until 1961 or to public transit until 1966 and did not extend full protection to transit employees until 1974. But while Congress did not fully exercise its powers to legislate respecting terms of employment in the transit industry until relatively recently, there can be no doubt that the constitutional authority to do so has long been available. If the states' acquisition of private transit operations were held to extend their intergovernmental immunity thereto, it necessarily would vitiate federal constitutional prerogatives. Moreover, the fact is that the FLSA *was* made applicable to the private transit industry in 1961, and, indeed, to public transit in 1966—*before* the bulk of the recent conversions to public ownership took place (see pages 16-18, *supra*).[32]

The Court in *Long Island R.R.* did observe that railroads had long been subject to federal regulatory legislation. 455 U.S. at 687-688. There was no suggestion, however, that such longstanding regulation was necessary to the holding that the State of New York could not extend its immunity to a commuter railroad merely by acquiring the railroad. Although the specific federal legislation at issue here is of comparatively recent vin-

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[32] The fact that the overtime provisions of the FLSA were not fully applied to the transit industry until 1974 does not alter the analysis. Congress had plainly entered the field of wage regulation in the transit industry with the 1961 and 1966 FLSA amendments. The overtime pay requirement is not regulation fundamentally different from that previously in place. No constitutional immunity may be founded upon Congress's decision to regulate one aspect of wages in a given industry but not another. Cf. *EEOC* v. *Wyoming*, slip op. 15 n.17.

tage, it scarcely follows that the freedom from such regulation of state activities of contemporaneous or still more recent vintage is essential to the separate and independent existence of the states. Cf. *Donovan* v. *Dewey*, 452 U.S. 594, 605-606 (1981). Because of the Supremacy Clause, the interests of the states and those of the federal government do not stand on a par in this area. Rather, within the broad limits of Congress's power to regulate commerce, federal legislation applies to the states to the extent deemed appropriate by Congress unless it is determined that such application "so impairs the ability of the state to carry out its constitutionally preserved sovereign function as to come into conflict with the Tenth Amendment." *Long Island R.R.*, 455 U.S. at 683. Unless state functions are already well-established at the time they become subject to nondiscriminatory federal commerce power legislation, it is difficult to discern significant "displace[ment of] the States' freedom to structure integral operations" (*National League of Cities*, 426 U.S. at 852).

In any event, if it were necessary to show that federal regulation of employment in the transit industry was established before the recent trend toward public operation of transit, the half-century of application of the National Labor Relations Act to the transit industry supplies the necessary predicate. Indeed, in *Long Island R.R.* the Court's recitation of the long history of federal railroad legislation was concerned primarily with regulatory schemes other than the Railway Labor Act, the statute directly in issue there. See 455 U.S. at 687-688 & n.13. Thus, like the railroad industry, local transit has long been the subject of substantial federal regulation governing employment relations.[33] To hold that the FLSA, which

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[33] The district court suggested (J.S. App. 9a, 10a) that statutes such as the NLRA are irrelevant here because Congress itself exempted local government employers from their reach. But the issue is not, as the district court thought (*id.* at 9a), whether "any diminution of federal authority under the NLRA that results from a private to public conversion is * * * consistent with congressional

expressly covers public transit employment, impermissibly interferes with state sovereignty is to sanction "ero[sion] of federal authority in [an] area[] traditionally subject to federal statutory regulation" (*Long Island R.R.*, 455 U.S. at 687).

C. Application Of The FLSA To Public Transit Systems Does Not Effect An Unwarranted Intrusion Upon State Sovereignty

1. Even if it were established that mass transit has assumed the status of a core local government function, appellees must demonstrate that application of the FLSA to public transit systems is a "federal intrusion[] that might threaten [the states'] 'separate and independent existence'" (*EEOC* v. *Wyoming*, slip op. 11 (quoting *National League of Cities*, 426 U.S. at 851)) by "directly displac[ing their] freedom to structure integral operations in [these] areas" (*National League of Cities*, 426 U.S. at 852). In view of the course of development of the public sector of the transit industry, and conditions prevailing in the private sector prior to the acceleration of public takeovers in the 1960's, appellees cannot make such a showing.[34]

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intent." Rather, the NLRA is instructive because it evidences that the transit industry has "traditionally [been] subject to federal statutory regulation" (*Long Island R.R.*, 455 U.S. at 687). In examining the succession of federal statutes that historically governed commerce by rail, the Court did not pause in *Long Island R.R.* to inquire whether particular statutes were applicable to publicly operated railroads. The relevance of these statutes was not that they established longstanding regulation of publicly owned railroads; it was sufficient that they established regulation of the heavily private railroad industry. Against this background of federal regulation of the railroad industry, the Court concluded that the Railway Labor Act, which expressly covers state owned commuter railroads (see 455 U.S. at 682 n.4), does not intrude impermissibly upon matters of state sovereignty. A similar analysis is applicable here.

[34] Contrary to appellees' contentions (SAMTA Mot. to Aff. 8-9 & n.8; APTA Mot. to Aff. 6-9), *National Leagues of Cities* does not

First, unlike the FLSA amendments of 1974 condemned in *National League of Cities*, the public transit provisions are carefully targeted at a discrete function, which in most cases was assumed by state and local governments after the initial application of the FLSA to transit operations and even after the application of the FLSA to public transit operations. Compare page 39, *supra*. Thus, in many instances local governments acquired transit systems knowing that they were subject to the Act. Compare *Long Island R.R.*, 455 U.S. at 689-690. And in entering the transit field, local governments could not reasonably have relied upon exemption from the FLSA of publicly owned common carriers operating in commerce. Furthermore, because the public transit provisions of the FLSA are limited in their coverage, their application does not create cause for the concern, underlying *National League of Cities*, "with the effect of the federal regulatory scheme [not only] on the particular decisions it was purporting to regulate, but also with the potential impact of that scheme on the States' ability to structure operations and set priorities over a wide range of decisions" (*EEOC* v. *Wyoming*, slip op. 12). Requiring public operators of transit systems to comply with minimum standards of decency in regard to wages, hours, and child labor is unlikely to set off "a virtual chain reaction of substantial and almost certainly unintended consequential effects on state decisionmaking," such as the Court foresaw in *National League of Cities* (*EEOC* v. *Wyoming*, slip op. 13). Rather here, as in *EEOC* v. *Wyoming* (*ibid.*), "[n]othing * * * portends anything

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resolve this "intrusiveness" issue for the public transit industry. The Court made this clear in *EEOC* v. *Wyoming*, slip op. 11 n.11):

> [W]e are not to be understood to suggest that every state employment decision aimed simply at advancing a generalized interest in efficient management—even the efficient management of traditional state functions—should be considered to be an exercise of an "undoubted attribute of state sovereignty."

like the same wide-ranging and profound threat to the structure of State governance." [35]

The impact of the public transit provisions of the FLSA is further diminished by Section 13(c) of the UMT Act, 49 U.S.C. 1609(c), which provides that "it shall be a condition of any assistance" under the UMT that "fair and equitable arrangements [be] made, as determined by the Secretary of Labor, to protect the interests" of affected employees. Such protective arrangements are required to preserve existing rights for employees of transit systems acquired by public entities. See *Jackson Transit*, 457 U.S. at 17-18. Because of Section 13(c), public transit operators that have accepted federal assistance do not enjoy untrammeled "freedom to structure integral operations" respecting the terms of transit employment. Instead, they are bound to maintain existing wage levels, which, for much of the private transit sector, had been subject to minimum wage standards since 1961. See page 3 note 5, *supra*.

Nor did phasing out of the special overtime exemption for transit operating employees in 1974 intrude upon state prerogatives in an impermissible fashion. To begin with, public transit systems have been required to pay overtime to nonoperating employees since 1966. Second, the overtime exemption was phased out, rather than abruptly abolished. Moreover, collective bargaining agreements in the transit industry at the time of the 1974 amendments almost uniformly required payment of overtime pay after 40 hours in a work week. Aff. of Alexander Cohn (May 19, 1980) ¶ 5; H.R. Rep. 93-913, 93d Cong., 2d Sess. 30-31 (1974). Application of the FLSA overtime standards to public transit systems accordingly does not compel the states generally "to abandon the[ir] public policy decisions" or to cease "do[ing] *precisely what they are doing*" (*EEOC* v. *Wyoming*, slip op. 12 (emphasis in original)).

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[35] The fact that transit service operates on a fee for service basis even in the public sector reduces to some degree the impact of "spillover" effects of transit costs on other public priorities. See page 48 note 37, *infra*.

Congress was aware of the claims of transit operators that paying overtime created special hardships for them in light of special attributes of transit service. H.R. Rep. 93-313, *supra*, at 30. But Congress determined that these problems could be accommodated within the framework of the Act by administrative and judicial construction, and by legislative fine-tuning if necessary (*id.* at 31). In addition, Congress determined, based on review of collective bargaining agreements in the industry, that "the 'problems' of the 40-hour workweek pointed to by some segments of the industry have and already are being met and resolved by a substantial majority of the industry." *Ibid.* Congress's determination that payment of overtime to operating employees would not significantly burden transit operations is entitled to deference.

2. Even when a federal commerce power enactment appears to interfere with protected state functions, a Tenth Amendment challenge may fail because "[t]here are situations in which the nature of the federal interest advanced may be such that it justifies State submission." *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. at 288 n.29; see also *Long Island R.R.*, 455 U.S. at 684 n.9; *National League of Cities*, 426 U.S. at 856 (Blackmun, J., concurring). This is such a situation. Denial of congressional authority to establish wage standards for mass transit systems would significantly "impair a prime purpose of the Federal Government's establishment" (*National League of Cities*, 426 U.S. at 855 n.18, quoting *Case* v. *Bowles*, 327 U.S. 92, 102 (1946)), because transit service is intimately related to the flow of interstate commerce, and because Congress has determined that coverage of public transit employees is necessary to avoid unfair competition.

In enacting the UMT Act, Congress recognized the national character of transit problems, emphasizing the interstate impact of transit operations in many locations:

> [T]he problem of providing adequate urban mass transportation service has long ago spilled over the

> boundaries of many local political jurisdictions. In fact, it has spilled over a good many State boundaries. Some 53 of our approximately 200 metropolitan areas either border on or cross State lines.

H.R. Rep. 204, *supra*, at 5. In the UMT Act itself Congress has determined (49 U.S.C. 1601(a)(1)) that

> the predominant part of the Nation's population is located in its rapidly expanding metropolitan and other urban areas, which generally cross the boundary lines of local jurisdictions and often extend into two or more States.

The courts also have long recognized the special significance of transit operations—even local ones—for the flow of interstate commerce. See, *e.g.*, *United States* v. *Capital Transit Co.*, 338 U.S. 286, 290 (1949); *Marshall* v. *Victoria Transportation Co*, 603 F.2d 1122 (5th Cir. 1979); *NLRB* v. *Baltimore Transit Co.*, 140 F.2d 51, 53-54 (4th Cir. 1944); see also *Local Transit Lines*, 91 NLRB 623, 624 (1950); cf. *Bus Employees, Div. 998* v. *Wisconsin Employment Relations Board*, 340 U.S. at 392 n.14. Because of the direct impact of transit service on interstate commerce the FLSA may constitutionally be applied to public transit employees.

This is especially so because in extending the Act's coverage, Congress expressly determined (H.R. Rep. 1366, *supra*, at 16-17; S. Rep. 1487, *supra*, at 8; see page 20, *supra*) that failure to include public transit systems would unfairly advantage such systems at the expense of private companies with which they were in competition, frustrating one of the basic purposes of the Act. Congress's "determin[ation] that a uniform regulatory scheme" covering public and private transit carriers is necessary to prevent unfair competition certainly was within its authority. *Long Island R.R.*, 455 U.S. at 688. If the Court were to extend intergovernmental immunity to public transit, it would thus effectively deprive the United States of its ability evenhandedly to regulate a significant aspect of interstate commerce. The immunity

doctrine recognized in *National League of Cities* plainly is not intended to afford government operated enterprises preferential status in regard to nondiscriminatory Commerce Clause regulation. See page 23, note 23, *supra*.

Nor has Congress's concern with unfair competition between private and public enterprise become outmoded by the growth of the public sector of the transit industry. The private sector of the industry remains substantial. See pages 17-18, *supra*. Moreover, the pattern of public acquisitions of private systems makes it particularly important not to provide government transit operators an unfair advantage over the remaining private sector operators. Even where public transit is a firmly established norm, the possibility remains for innovative entrepreneurs to devise new services that will successfully compete for patronage.[36] Extension of the intergovernmental immunity doctrine to public transit services necessarily handicaps those who would provide competing services, to the detriment of the public and the free flow of commerce.[37]

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[36] For instance, in the New York City area a number of privately owned express bus operations emerged in the late 1960's and 1970's. N.Y. Times, June 11, 1970, at 90, col. 1. As of 1981 there were 11 privately owned bus transit lines operating within New York City alone. *DOT Urban Transit Directory* 2 (see page 18, note 17, *supra*).

[37] In considering the federal interest in preventing such unfair competition, it is important to remember that, unlike the core governmental services held exempt from the FLSA in *National League of Cities*, which are generally provided to members of the public without user charges, public transit operates on a fee-for-service basis, in competition with other modes of transportation. See *Jefferson County Pharmaceutical Ass'n*, slip op. 4 n.7.

We recognize that, unlike police and fire protection, education, sanitation, public health, and parks, public hospitals undoubtedly receive fees from many of their patients. But even so, public hospitals as well as private nonprofit hospitals have a substantial tradition of providing service free of charge to persons unable to pay. See J. Duffy *A History of Public Health in New York 1866-1966* 178-185 (1974) (80% of patients in hospitals on Manhattan Island

3. Appellees' argument that public transit service is a core governmental function necessarily rests heavily upon the recent expansion of the public sector of the local transit industry (see APTA Mot. to Aff. 11-13; SAMTA Mot. to Aff. 19-23 & n.21). But the district court and appellees ignore the fact that the FLSA was applied to the public sector of the transit industry in 1966, at a time when transit service was, by any measure, still predominantly a service provided by private enterprise. See page 17, *supra*. Thus, any contemporaneous challenge to the constitutionality of the public transit provisions of the 1966 FLSA amendments surely would have been rejected as frivolous. See, *e.g.*, *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. at 422 (opinion of Burger, C.J.); cf. *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 352-353 (1974); *Helvering* v. *Powers*, *supra*. Indeed, appellees do not suggest otherwise.[38]

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were charity cases). Cf. Hill-Burton Act, 42 U.S.C. 291c(e). Transit service is unlike these core functions in that, with rare exceptions, all patrons are required to pay fares that defray a substantial share of operating costs. It is true that, in recent years, transit systems have been unable to meet operating expenses without subsidies from tax revenues. Even so, passenger revenues cannot be regarded as insignificant. In 1980 fares collected amounted to $2.46 billion, and constituted 40.7% of transit industry operating revenues. *Transit Fact Book 1981*, *supra*, at 45, 46 (table 5). Thus, unlike the services held exempt from the FLSA in *National League of Cities*, public transit service is virtually never made "available at little or no direct expense" (*Amersbach* v. *City of Cleveland*, 598 F.2d 1033, 1037 (6th Cir. 1979)).

[38] We note that in testifying before Congress against bills to extend FLSA coverage to state and municipal employees in 1971, a representative of the National League of Cities conceded that "transit would be an activity of local government with comparable activity in private enterprise, and therefore * * * could probably be regulated [even though a] municipality was performing the activity." *Fair Labor Standards Amendments of 1971: Hearings on S. 1861 and S. 2259 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 92d Cong., 1st Sess., Pt. 5, 1701 (1971) (statement of Richard E. Thompson).

Of course, no such contemporaneous challenge was made; nor was the public transit coverage of the FLSA attacked in *National League of Cities* itself. Nevertheless, appellees' contention is that intervening developments in the transit industry have now rendered these very provisions beyond Congress's authority under the Commerce Clause. Even if federal aid had not played a substantial role in the growth of the public sector of the transit industry, and even if concern for competition between private and public transportation alternatives were not still a sufficient justification for federal legislation, it would indeed be a peculiar and unworkable rule of constitutional law that would countenance this result. On what date did the public transit provisions of the FLSA, assuredly valid when enacted, become unconstitutional? If this doctrine of creeping unconstitutionality were accepted, Congress and the courts would effectively be enjoined to survey subsisting legislation "adjusting burdens and benefits of economic life" (*Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. at 15) at regular intervals in order to ensure that changed economic or social conditions had not altered the basis for exercise of federal commerce power authority.

In our constitutional scheme, it is uniquely Congress's role periodically to revisit legislative determinations such as those underlying the public transit provisions of the FLSA, and to adjust them, as the public interest may require, in light of changing conditions, including the expanded role of government (state, local or federal) in the provision of particular services. But precisely because that is so, because Congress is far better equipped than the courts to weigh the pertinent social and economic considerations, and because the interests of the states and municipalities and their citizens are well represented in Congress, extension of a rigid rule of constitutional law to provide an exemption from the FLSA that public transit operators deem desirable is inappropriate. Rather, Congress is the forum to which such petitions should be addressed.

Significantly, on the very day that *Long Island R.R.* was decided, a unanimous Court applied the principles outlined above to limit the constitutional intergovernmental tax immunity of agents of the federal government:

> If the immunity of federal contractors is to be expanded beyond its narrow constitutional limits, it is Congress that must take responsibility for that decision * * *. And this allocation of responsibility is wholly appropriate, for the political process is "uniquely adapted to accommodating the competing demands" in this area. *Massachusetts* v. *United States*, 435 U.S. 444, 456 (1978) (plurality opinion). * * * But absent congressional action, we have emphasized that the States' power to tax can be denied only under "the clearest constitutional mandate."

United States v. *New Mexico*, 455 U.S. 720, 737-738 (1982) (citations omitted). Similarly, in rejecting another claim of intergovernmental tax immunity advanced by the United States, the Court observed:

> Wise and flexible adjustment of intergovernmental tax immunity calls for political and economic considerations of the greatest difficulty and delicacy. Such complex problems are ones Congress is best qualified to resolve.

United States v. *City of Detroit*, 355 U.S. 466, 474 (1958). These considerations are equally relevant in assessing wide-ranging state claims to intergovernmental immunity from federal commerce power legislation.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

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DECEMBER 1983

APPENDIX

1. The Constitution of the United States provides in pertinent part:

Article I, Section 8:

> The Congress shall have Power
>
> * * * * *
>
> To regulate Commerce * * * among the several States * * *;
>
> * * * * *
>
> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Article VI, cl. 2:

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land * * *.

Tenth Amendment:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

2. The Fair Labor Standards Act of 1938, 29 U.S.C. (& Supp. V) 201 *et seq.*, provides in pertinent part:

29 U.S.C. (& Supp. V) 203:

> As used in this chapter—
>
> * * * * *
>
> (d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a

public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

* * * * *

(r) "Enterprise" means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose. * * * For purposes of this subsection, the activities performed by any person or persons—

* * * * *

(2) in connection with the operation of a street, suburban or interurban electric railway, or local trolley or motorbus carrier, if the rates and services of such railway or carrier are subject to regulation by a State or local agency (regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit), or

(3) in connection with the activities of a public agency,

shall be deemed to be activities performed for a business purpose.

(s) "Enterprise engaged in commerce or in the production of goods for commerce" means an enterprise which has employees engaged in commerce or in the production of goods for commerce, or employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person, and which—

(1) * * * is an enterprise * * * whose gross annual volume of sales made or business done is not less than $250,000 * * *

* * * * *

(5) is engaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, a preschool, elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit); or

(6) is an activity of a public agency.

* * * * *

The employees of an enterprise which is a public agency shall for purposes of this subsection be deemed to be employees engaged in commerce, or in the production of goods for commerce, or employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce.

* * * * *

29 U.S.C. (Supp. V) 206(a):

Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates:

(1) not less than $2.65 an hour during the year beginning January 1, 1978, not less than $2.90 an hour during the year beginning January 1, 1979, not less than $3.10 an hour during the year beginning January 1, 1980, and not less than $3.35 an hour after December 31, 1980, except as otherwise provided in this section;

29 U.S.C. 207(a):

> (1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

3. The Urban Mass Transportation Act of 1964, 49 U.S.C. (& Supp. V) 1601 *et seq.*, provides in pertinent part:

49 U.S.C. 1601:

> (a) The Congress finds—
>
> (1) that the predominant part of the Nation's population is located in its rapidly expanding metropolitan and other urban areas, which generally cross the boundary lines of local jurisdictions and often extend into two or more States;
>
> (2) that the welfare and vitality of urban areas, the satisfactory movement of people and goods within such areas, and the effectiveness of housing, urban renewal, highway, and other federally aided programs are being jeopardized by the deterioration or inadequate provision of urban transportation facilities and services, the intensification of traffic congestion, and the lack of coordinated transportation and other development planning on a comprehensive and continuing basis; and
>
> (3) that Federal financial assistance for the development of efficient and coordinated

mass transportation systems is essential to the solution of these urban problems.

(b) The purposes of this chapter are—

(1) to assist in the development of improved mass transportation facilities, equipment, techniques, and methods, with the cooperation of mass transportation companies both public and private;

(2) to encourage the planning and establishment of areawide urban mass transportation systems needed for economical and desirable urban development, with the cooperation of mass transportation companies both public and private; and

(3) to provide assistance to State and local governments and their instrumentalities in financing such systems, to be operated by public or private mass transportation companies as determined by local needs.

49 U.S.C. (Supp. V) 1603(a):

* * * The Federal grant for any such project to be assisted under section 1602 of this title shall be in an amount equal to 80 per centum of the net project cost. * * *

49 U.S.C. 1604(d)(1)

The Secretary may approve as a project under this section, on such terms and conditions as he may prescribe, (A) the acquisition, construction, and improvement of facilities and equipment for use, by operation or lease or otherwise, in mass transportation service, and (B) the payment of operating expenses to improve or to continue such service by operation, lease, contract, or otherwise.

49 U.S.C. 1604(e):

The Federal grant for any construction project under this section shall not exceed 80 per

centum of the cost of the construction project, as determined under section 1603(a) of this title. The Federal grant for any project for the payment of subsidies for operating expenses shall not exceed 50 per centum of the cost of such operating expense project. * * *

49 U.S.C. 1609(c):

It shall be a condition of any assistance under section 1602 of this title that fair and equitable arrangements are made, as determined by the Secretary of Labor, to protect the interests of employees affected by such assistance. Such protective arrangements shall include, without being limited to, such provisions as may be necessary for (1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise; (2) the continuation of collective bargaining rights; (3) the protection of individual employees against a worsening of their positions with respect to their employment; (4) assurances of employment to employees of acquired mass transportation systems and priority of reemployment of employees terminated or laid off; and (5) paid training or retraining programs. Such arrangements shall include provisions protecting individual employees against a worsening of their positions with respect to their employment which shall in no event provide benefits less than those established pursuant to section 5(2)(f) of this title. The contract for the granting of any such assistance shall specify the terms and conditions of the protective arrangements.

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